

89-1871

(1)

Supreme Court, U.S.

FILED

MAY 29 1990

JOSEPH F. SPANIOLO, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

J. Robert Burk, Jr.,
Petitioner,
v.
Patricia A. Burk,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW HAMPSHIRE

J. Robert Burk, Jr., Pro Se
20 Ledgewood Hills Drive
Apartment No. 207
Nashua, N. H. 03062
(603) 881-9617

May 25, 1990



QUESTIONS PRESENTED

1. Whether the New Hampshire Supreme Court contravened Petitioner's right to due process of law under the Fourteenth Amendment to the United States Constitution by summarily determining on the merits questions involving substantial liberty interests in custody of minor children and property distribution, where Petitioner had claimed that the evidence at trial was insufficient to support challenged portions of a divorce decree, and no State appellate court reviewed the record of proceedings below.
2. Whether Petitioner was denied due process of law by having the merits of his divorce determined by a mere attorney, not a judicial officer as defined by State law, where no judicial officer ever heard or reviewed disputed issues de



novo or reviewed any record of the trial proceedings.

3. Whether Petitioner was denied due process of law in the State divorce case by being denied the opportunity to review the file of the court-appointed guardian ad litem, thus preventing him from fully and effectively preparing for trial on disputed issues of child custody and visitation, upon which the guardian made contested recommendations based on information in his file.
4. Was Petitioner denied due process of law and/or the equal protection of the laws where Respondent was allowed to remove the children from the State of New Hampshire to the State of Colorado, in which case the decree called for a 73% reduction in Petitioner's custody/visitation with the children from 169 days per year to a mere 46 days per year,

contrary to the liberty interests
protected by the Fourteenth Amendment?



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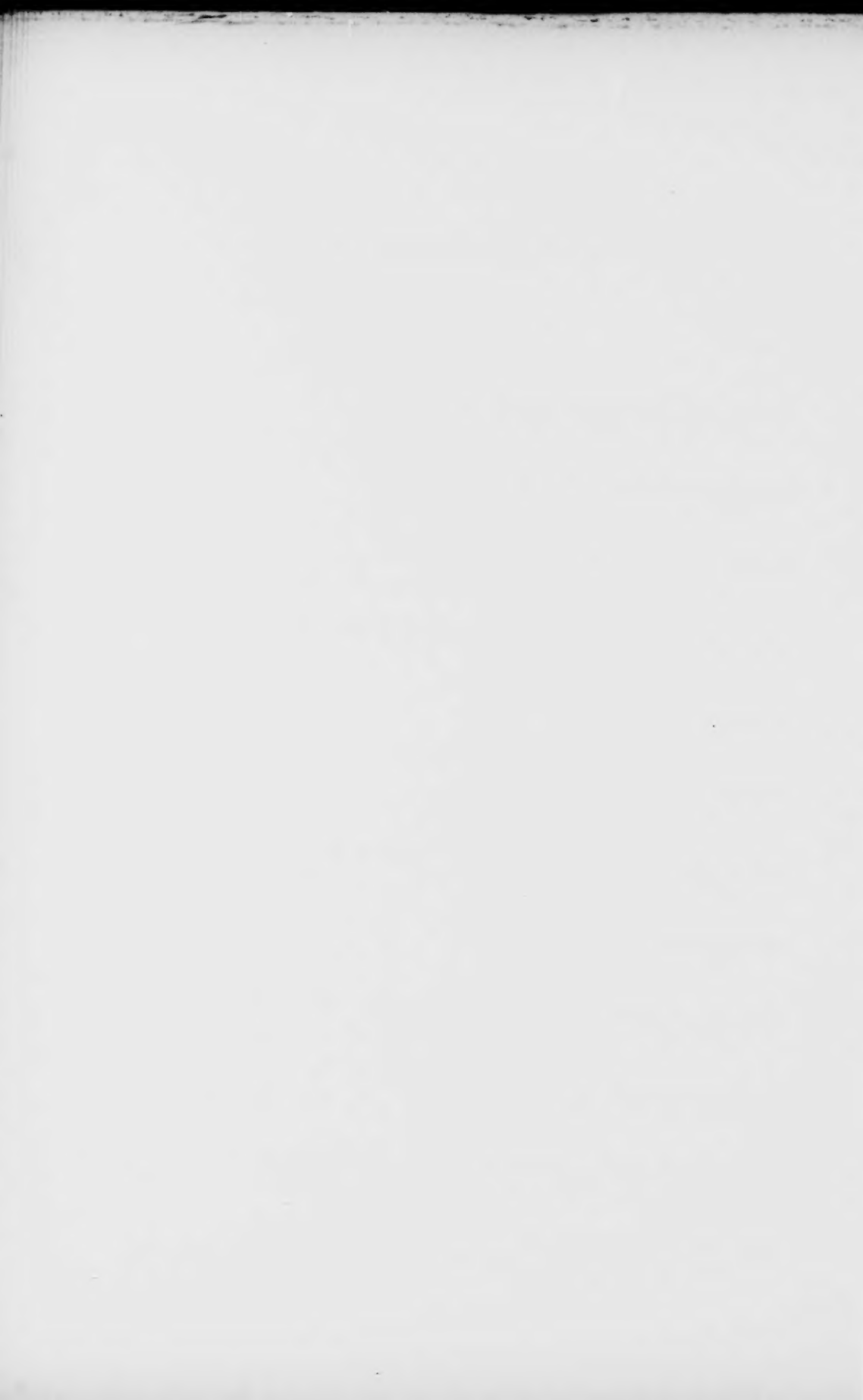
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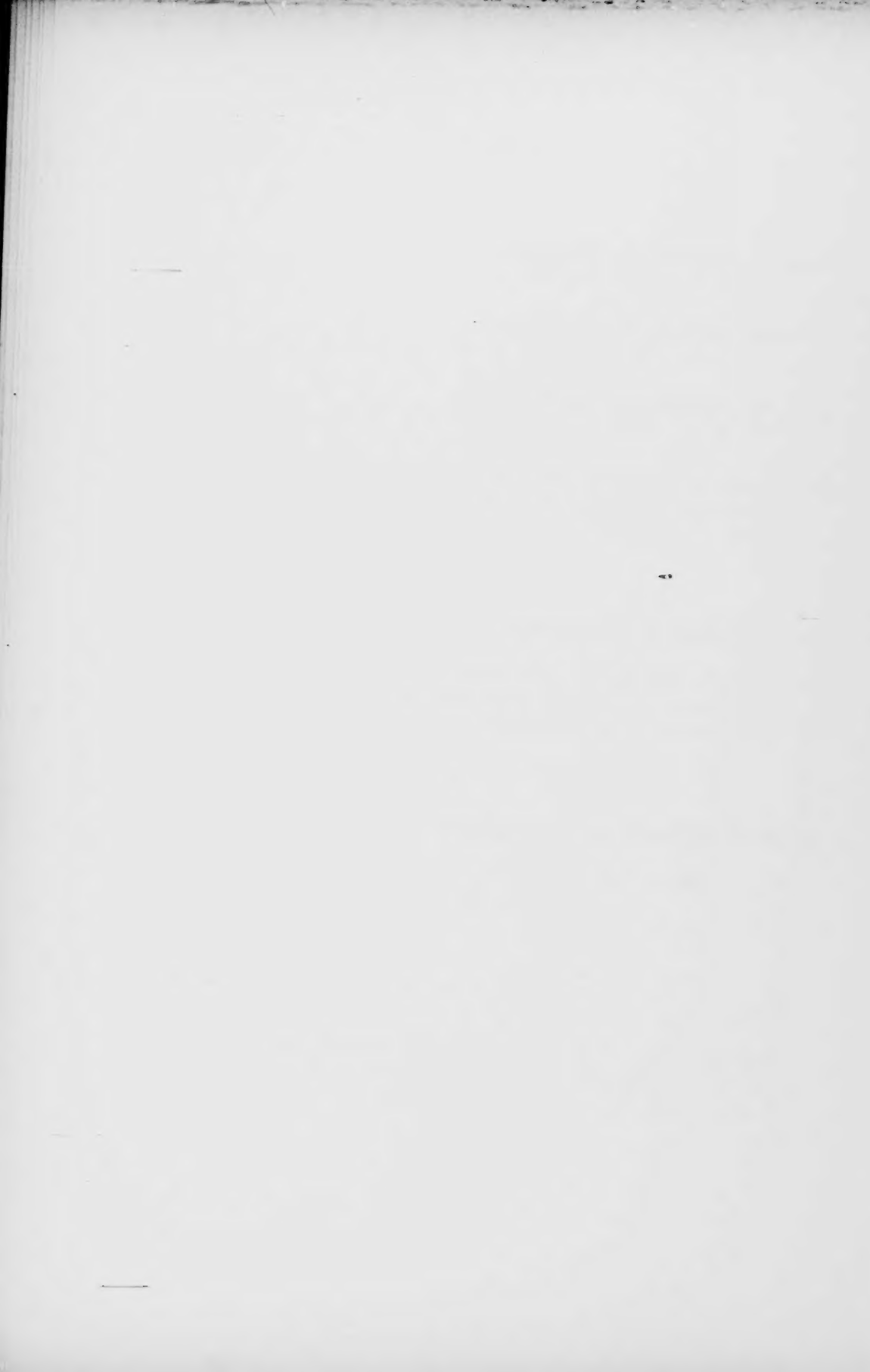
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

No.

J. Robert Burk, Jr.,

v.

Patricia A. Burk

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW HAMPSHIRE

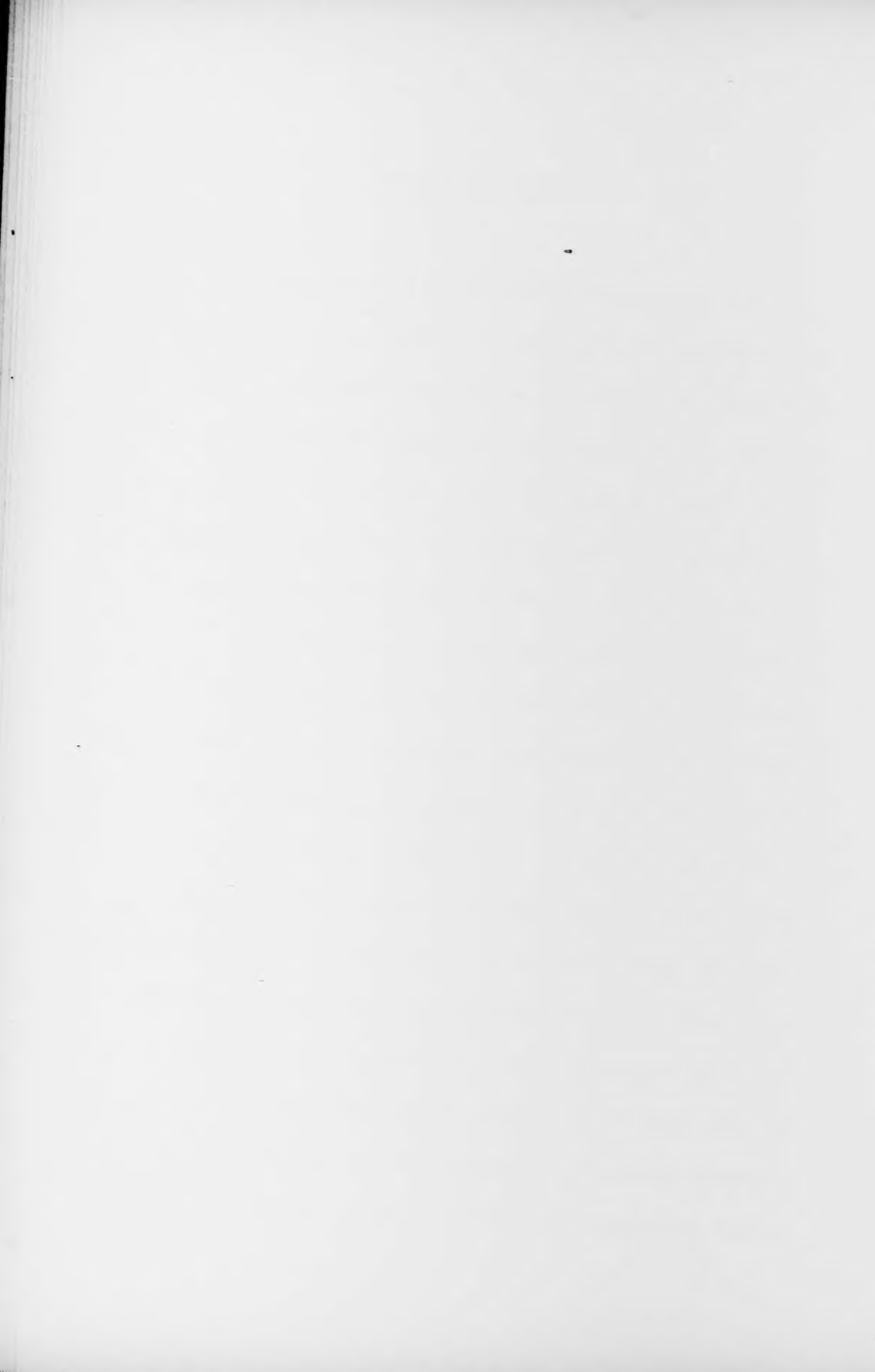
Petitioner J. Robert Burk, Jr., Pro Se,
respectfully prays that a writ of certiorari
issue to review the judgment of the New
Hampshire Supreme Court entered in the
above-entitled cause on January 9, 1990.
This Order is reproduced as Appendix I,
annexed hereto.

OPINION BELOW

The one-page order challenged herein was issued on January 9, 1990 as a "summary affirmance" without opinion, and without review of the record, "in accordance with [N.H. Supreme Court] Rule 25(1)(a)," see, Appendix I, annexed hereto, with no hearing.

Petitioner moved for reconsideration, citing the constitutional violation of determining sufficiency of the evidence questions "summarily" without any review of the record. See, Bundy v. Wilson, 815 F.2d 125 (1st Cir. 1987) (due process forbids such determinations when substantial liberty interests are at stake). Petitioner's motion for reconsideration was timely filed.

The Supreme Court of New Hampshire denied the motion for reconsideration without hearing or opinion in an Order dated February 27, 1990. See, Appendix II,



annexed hereto.

Neither order was published in any form.

JURISDICTION

This Petition is timely filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1257(3) and 2101(c), and Rules 20.2 and 28.2, Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS

This Petition involves claims arising under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, which prohibit deprivations of liberty or property without due process of law and the equal protection of the laws.



STATEMENT OF THE CASE

The basic facts and procedural history of this case, necessary for a determination of the questions presented in this Petition, are not in dispute.

Petitioner filed for divorce in the New Hampshire Superior Court, sitting in Hillsborough County, on November 23, 1987, case number 87-M-2028.

Numerous issues arose as to custody of and visitation with the parties' three minor children, and with respect to division of the parties' marital estate.

Petitioner demanded hearing, or re-hearing de novo on disputed issues by a regular justice of the Superior Court, duly commissioned under State law as a judicial officer. His repeated motions in this regard were denied by the Superior



Court, and not heard by the Supreme Court of New Hampshire. See, Order of "summary affirmance," Appendix I, in New Hampshire Supreme Court case number 89-482.

Among the issues raised by Petitioner in his State Notice of Appeal in No. 89-482, was the denial of access to the Guardian Ad Litem's file for effective trial preparation and preparation for cross-examination, and the provision of the final decree requiring a 73 % reduction in custody/visitation time in the event Respondent moved out of the State of New Hampshire, to Colorado, which the decree allowed her to do at her whim. These issues were preserved in the Superior Court by timely objection, motion, or motion for reconsideration of the decree under State practice.

When the New Hampshire Supreme Court summarily affirmed the decree, overruling Petitioner's sufficiency of the evidence

challenges thereto, Petitioner filed a timely motion for reconsideration raising the due process issue under the Fourteenth amendment. The motion was dated January 16, 1990.

The only hearing Petitioner was ever afforded in the State courts was before a marital master who was as a matter of State law not a judicial officer, and was, rather, merely a private attorney sitting for the day, "[e]ffectively...[as] a de facto judge." Cornforth v. Cornforth, 123 N.H. 61, 63, 455 A.2d 1049 (1983). This constitutional grievance of Petitioner's was ignored by both the Superior and Supreme Courts of New Hampshire. The Superior Courts of the State are so backlogged that were a trial judge to be assigned to hear or even review the transcriptural record of divorce cases, virtually no other business could be conducted in the courts. This explains, but



does not justify, the jurisdictional and hence due process defects in the State system which allows determination of cases by non-judges with no judicial review in either the Superior or Supreme Courts, contrary to the hearing requirement of the Fourteenth Amendment.

The Superior Court refused Petitioner's timely motions for production of the transcriptural record of proceedings before the master, for review by a Justice, and the Supreme Court denied Petitioner's request for requisition of the transcript of Superior Court proceedings for review by the Supreme Court in connection with the notice of appeal in No. 89-482.

Petitioner's motion for reconsideration of the judgment of the New Hampshire Supreme Court in this case was denied by that Court in its Order dated February 27, 1990. See, Appendix II. This timely Petition follows.

REASONS FOR ALLOWANCE OF THE WRIT

The New Hampshire Supreme Court has decided important questions of federal law which have not been, but should be, settled by this Court, and has decided federal questions in a way that conflicts with applicable decisions of this Court and of the United States Court of Appeals for the First Circuit. Rule 10.1(b) & (c), Rules of the Supreme Court of the United States (eff. January 1, 1990).

- I. THE DECISION OF THE SUPREME COURT OF NEW HAMPSHIRE TO SUMMARILY AFFIRM PETITIONER'S SUFFICIENCY OF THE EVIDENCE QUESTIONS, IN HIS ONLY APPEAL ALLOWED AS OF RIGHT UNDER STATE LAW, WITHOUT REVIEWING THE TRIAL RECORD, CONFLICTED WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT IN BUNDY V. WILSON, 815 F.2d 125 (1st Cir. 1987) AND CASES OF THIS COURT COLLECTED THEREIN, AND OFFENDED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE SUBSTANTIAL LIBERTY AND PROPERTY INTERESTS WERE AT STAKE.

Petitioner had appealed to the New Hamp-

shire Supreme Court that the evidence at trial was insufficient as a matter of law to support the decree in this case. The State Court summarily affirmed the decision below in accordance with Rule 25(1)(a), N. H. Supreme Court Rules Annotated, which allows such a disposition, even where, as here, the trial record was not requisitioned by the State Supreme Court, nor reviewed by it in any fashion.

The United States Court of Appeals for the First Circuit ruled in Bundy v. Wilson, 815 F.2d 125 (1st Cir. 1987) that where substantial liberty interests were at stake, as in felony appeals, the New Hampshire Supreme Court could not enforce its Rule 25 in such a manner as to determine sufficiency of the evidence questions without some review of the evidence at trial.

In Your Petitioner's case, substantial liberty interests in custody of and visitation



with his minor children were at stake, along with substantial property interests in tens of thousands of dollars of marital assets. It is beyond dispute that the Due Process Clause of the Fourteenth Amendment protects both "liberty" and "property." Board of Regents v. Roth, 408 U.S. 564 (1972).

The First Circuit concluded in Bundy that what process that was due litigants in the New Hampshire Supreme Court included actual review of a trial record before summary disposition could be made of questions implicating the sufficiency of the evidence at trial. The Court of Appeals holding was squarely on due process grounds, emphasizing that an appeal to the New Hampshire Supreme Court is a litigant's one and only chance for review in New Hampshire, there being no intermediate court of appeals in the State system.

Your Petitioner's appeal to the New



Hampshire Supreme Court was indeed his only available judicial review of a trial master's determination of his divorce case. Due process required that the New Hampshire Supreme Court not summarily affirm the challenged portions of the decree without some review of the evidence to support it.

This obvious deprivation of Federal due process is a special and important reason for this Court to grant the writ in this case.

II. PETITIONER WAS DENIED FOURTEENTH AMENDMENT DUE PROCESS BY HAVING THE MERITS OF HIS DIVORCE DECIDED BY A MERE ATTORNEY—NOT A JUDICIAL OFFICER AS DEFINED BY STATE LAW—WHERE NO JUDICIAL OFFICER EVER HEARD OR REVIEWED DISPUTED ISSUES DE NOVO OR REVIEWED ANY RECORD OF THE TRIAL PROCEEDINGS.

Another patent defect in the State proceedings, of Constitutional dimension, was the failure and refusal of the State to

afford Your Petitioner any hearing by a judicial officer prior to the determination of the merits of his divorce case.

A "judicial officer" in New Hampshire is one nominated and appointed by the Governor and Executive Council pursuant to Part II, Articles 46 & 47 of the New Hampshire Constitution. Opinion of the Justices, 128 N.H. 17, 19, 509 A.2d 746 (1986). The private attorney who sat as a "master" in this case was "not so appointed, tenured, or empowered" as a "judicial officer" as a matter of law. Id., at 20. He lacked the "necessary characteristic of a judicial officer [,namely] the authority to render judgment to determine issues that are properly raised before the judicial branch," id., at 19, citing Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 718 (1838) and N.H. Constitution, Part I, Art. 37 and Part II, Art. 72-a. Accordingly, this master

had no jurisdiction, "that final authority," Opinion of the Justices, supra, 128 N.H., at 19, to determine the issues in Petitioner's divorce case. Ibid, citing R. Wiebusch, 5 NEW HAMPSHIRE PRACTICE: CIVIL PRACTICE AND PROCEDURE, Ch. 39 (Equity, 1984). See especially, id., Wiebusch, § 1380, n. 85 (Supp. 1989) ("The [N.H.] Supreme Court has recently acknowledged that the Superior Court judge usually gives a Master's Report only cursory review before approving and signing it. State ex rel. Casinelli v. Bourgeois, 127 N.H. 754, 506 A.2d 351 (1986)").

The "cursory review" in Your Petitioner's case included denying Petitioner's requests for de novo rehearing of disputed issues by a duly-commissioned Superior Court Justice, and denial of Petitioner's motion for production of the transcript of proceedings before the Master, for review by a Justice at a minimum. Thus, there was no review whatever by any judicial



officer of any issue raised in this divorce case.

The lack of hearing by any judicial officer, and the consequent sole determination of all issues by a non-judicial master—lacking jurisdiction to decide cases—worked a total deprivation of Fourteenth Amendment due process of law to Petitioner's disadvantage in this case.

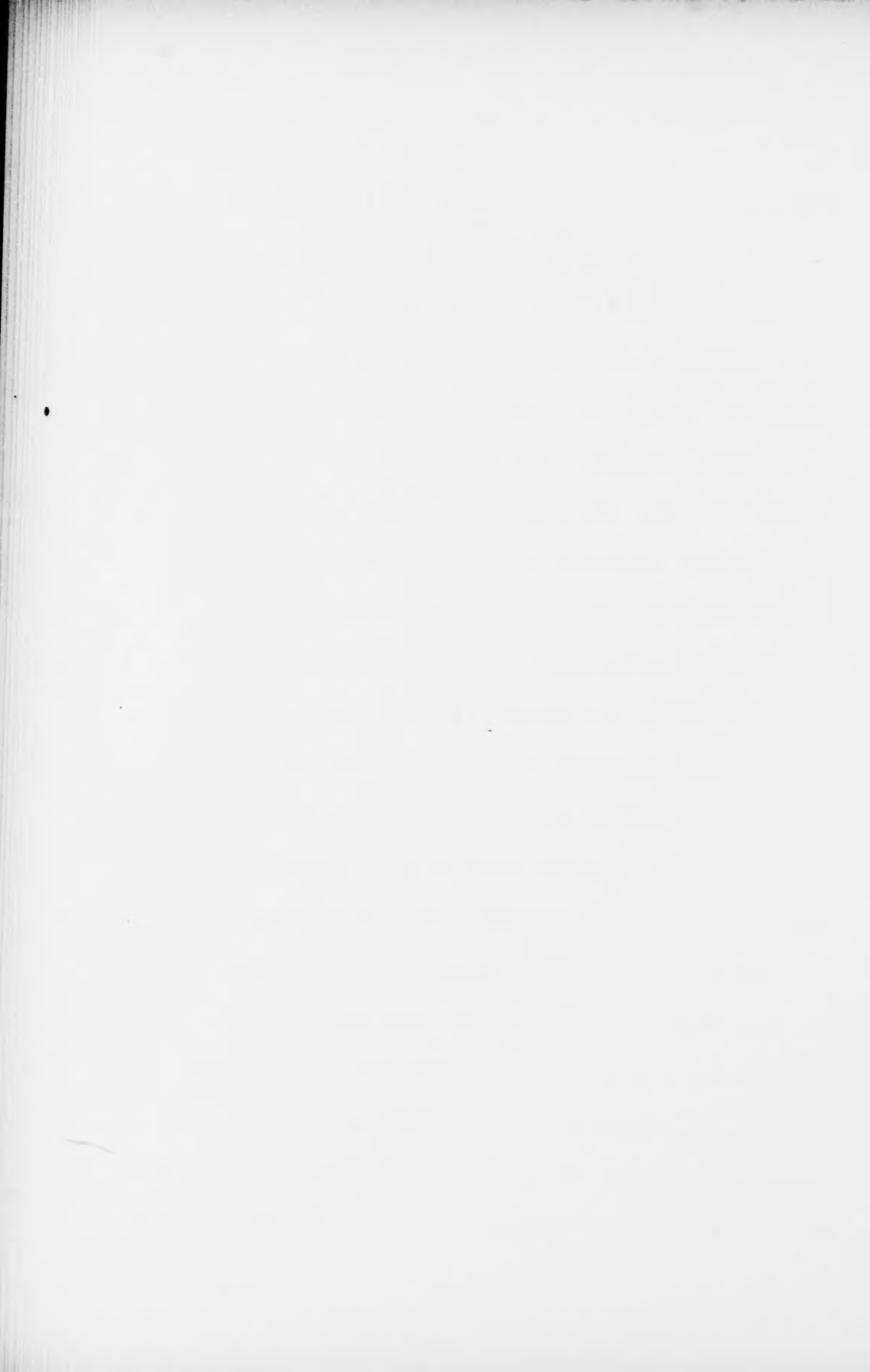
The United States Court of Appeals for the First Circuit reviewed a similar challenge arising in a New Hampshire divorce case, see, Witte v. Justices of the New Hampshire Superior Court, 831 F.2d 362 (1st Cir. 1987), and concluded that where the State litigant had the opportunity for de novo rehearing or some other review of the proceedings before the Master, the State system was constitutional as a matter of due process of law, as was the Federal Magistrate Act upheld in United



States v. Raddatz, 447 U.S. 667, 677-681 (1980), for the same reasons. Witte v. Justices, *supra*, 831 F.2d, at 364.

However, this Court pointed out in Raddatz, *ibid*, by its citation to Morgan v. United States, 298 U.S. 468, 481 (1936) ("the one who decides must hear" the case or address himself to the evidence in some form) that a master or magistrate system can survive constitutional challenge only if a litigant is heard in some form by a judicial officer on "those portions of the magistrate's report to which objection is made," as stated in Witte v. Justices, *supra*, 831 F.2d, at 364, citing Raddatz.

Here there was no meaningful hearing or even "appellate" review of the transcriptural record of proceedings before the master by any Justice of the New Hampshire Superior Court, on points contested by Petitioner. *Cf.*, Witte v. Justices, *supra*,



at 363 n.2; Bundy v. Wilson, 815 F.2d 125, 129 & n.3, 133 (1st Cir. 1987) (meaningful appellate review of trial proceedings impossible without review of transcript or other adequate record as a matter of due process of law).

Since it is undisputed that no judicial officer heard or even reviewed evidence or proceedings in this case, and the master who heard and decided the case had no authority or jurisdiction to do so as a clear matter of State law, a palpable violation of the jurisdiction and hearing requirement of the Due Process Clause of the Fourteenth Amendment to the United States Constitution appears in this case.

This fundamental constitutional defect is a special and important reason for this Court to grant this Petition. This practice is routine in New Hampshire and should be stopped by this Court, before it spreads elsewhere.



III. PETITIONER WAS DENIED DUE PROCESS OF LAW IN THE STATE DIVORCE CASE BY BEING DENIED THE OPPORTUNITY TO REVIEW THE FILE OF THE COURT-APPOINTED GUARDIAN AD LITEM, THUS OBSTRUCTING HIS RIGHT TO FULLY AND EFFECTIVELY PREPARE FOR TRIAL ON DISPUTED ISSUES OF CHILD CUSTODY AND VISITATION, UPON WHICH THE GUARDIAN MADE CONTESTED RECOMMENDATIONS BASED ON INFORMATION IN HIS FILE.

"[S]ince due process requires that either parent have the opportunity to challenge any evidence presented for consideration by the trier of fact" in a divorce case, including a report from a court-appointed guardian ad litem, Ross v. Gadwah, 131 N.H. 391, 394, 554 A.2d 1284 (1988), even otherwise privileged communications contained in the GAL's file must be made available to litigants, id., at 395.

"Because 'an essential requisite of due process' is the right to be heard, parents must be accorded that right in custody proceedings...[which] must provide

for 'confrontation when adjudicative rights [or facts] are in dispute....The right to be heard includes the right to cross-examine adverse witnesses....Parents rights of due process therefore mandate that they have an opportunity to counter evidence that a fact-finder will rely on in reaching a judgment determining their child's fate. Therefore, none of the information the guardian gathers can be shielded from discovery" by the parties to the State litigation. Ross v. Gadwah, supra, 131 N.H., at 395, 554 A.2d 1284.

Here it is not disputed that Your Petitioner's request for access to the guardian's file was denied by the GAL and the trial master, and Petitioner was accordingly denied effective confrontation and contest of the facts relied on by the Guardian in reaching his recommendation against Petitioner having custody of his

minor children in this divorce case.

This Court has also held in two celebrated criminal cases that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive" as a matter of due process of law, United States v. Nobles, 422 U.S. 225, 230-231 (1975), quoting United States v. Nixon, 418 U.S. 683, 709 (1974), even as against a claim of privilege from disclosure, id. "Previously recorded statements of witnesses [are necessary] so that the [party] may get the full benefit of cross-examination and the truth-finding process may be enhanced." United States v. Nobles, *supra*, 422 U.S., at 231.

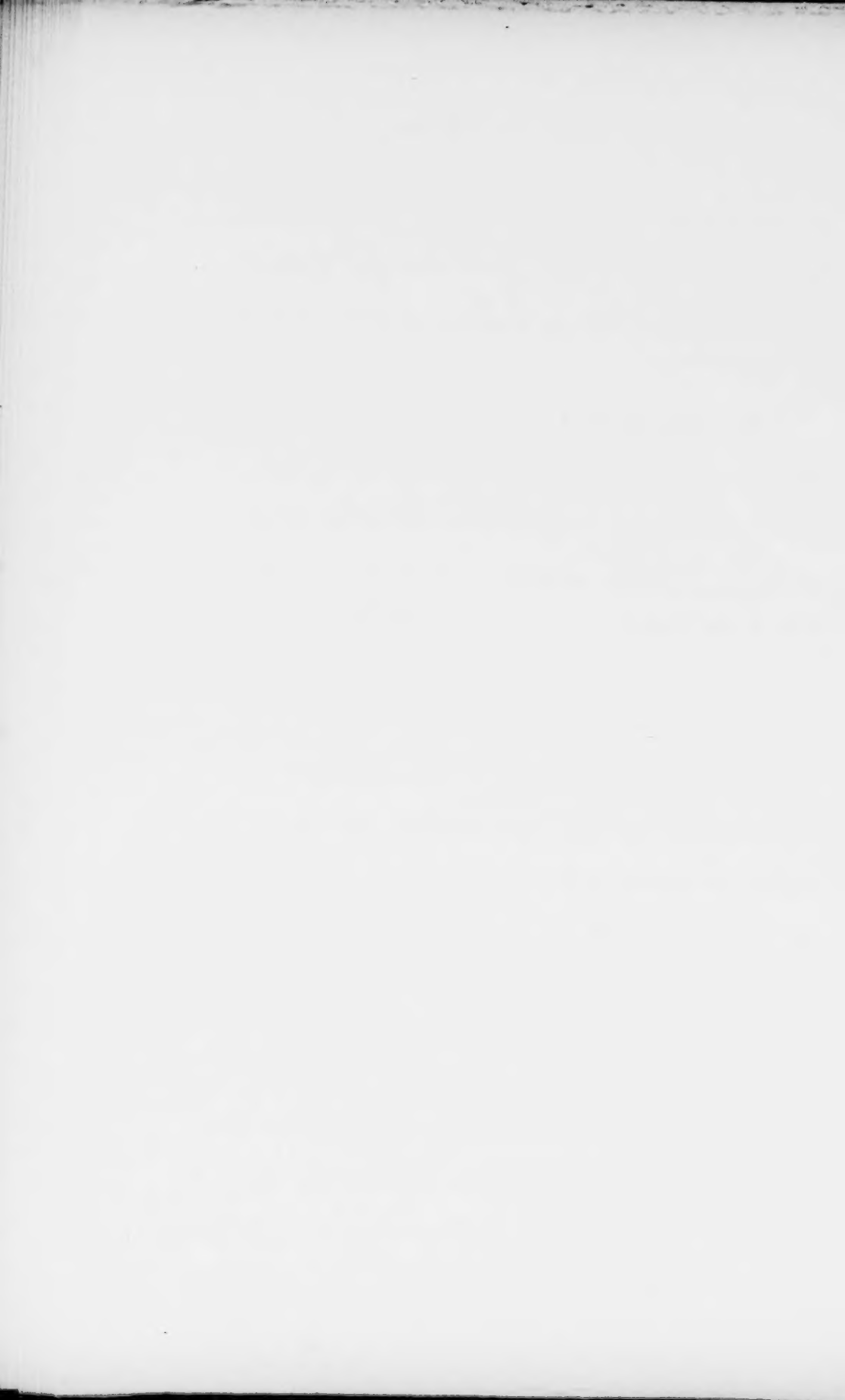
It is an "ancient proposition of law" ...that 'the public...has a right to every man's evidence.' except for those persons protected by a constitutional, common-law

or statutory privilege." Branzenburg v. Hayes, 408 U.S. 665, 668 (1972), quoted in United States v. Nixon, supra, 418 U.S., at 709.

The Guardian had no "privilege" protecting disclosure of the information sought by Your Petitioner in this case. Ross v. Gadwah, supra, 131 N.H., at 395, 554 A.2d 1284.

This Court has not clearly held that these fundamental due process rights of confrontation and trial preparation are guaranteed by the Fourteenth Amendment in State divorce cases where liberty interests in child custody and visitation are at stake.

These special and important fundamental rights should be clarified by this Court for the better administration of justice in the several States, and this is a substantial reason for the Court to allow the writ herein.



IV. PETITIONER WAS DENIED FOURTEENTH AMENDMENT DUE PROCESS OF LAW AND/OR THE EQUAL PROTECTION OF THE LAWS WHERE RESPONDENT WAS ALLOWED TO REMOVE THE CHILDREN FROM THE STATE OF NEW HAMPSHIRE TO THE STATE OF COLORADO, IN WHICH CASE THE DIVORCE DECREE MANDATED A 73% REDUCTION IN PETITIONER'S CUSTODY/VISITATION WITH THE CHILDREN (FROM 169 DAYS PER YEAR TO A MERE 46), CONTRARY TO PETITIONER'S FUNDAMENTAL LIBERTY INTERESTS IN THIS CASE.

There is no doubt that "the role of parents in the life of a family has attained the status of a fundamental human right and liberty. State v. Robert H. _____, 118 N.H. 713, 715, 393 A.2d 1387, 1388 (1978)." Ross v. Gadwah, 131 N.H. 391, 395, 554 A. 2d 1284 (1988).

This Court has held the same as a matter of Federal due process of law. Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("one of liberties protected by the Due Process Clause of the Fourteenth Amendment"), quoted in State v. Robert H. _____, ibid.



Moreover, this Court has implied that the Equal Protection Clause may protect liberty interests in child custody and visitation matters and other aspects of family life. Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring), cited for the rule of decision in State v. Robert H. _____, supra, 118 N.H., at 715, 393 A.2d 1387, 1388 ("Appropriate limits [on family rights] come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society'").

Here, Your Petitioner's divorce decree mandated that Respondent could remove the children from the jurisdiction of New Hampshire at her whim, in which event Petitioner's rights of custody and visitation would be massively curtailed

automatically, without further judicial review.

No rational basis or reasonable ground of distinction was ever advanced as to why Petitioner should be capriciously deprived of so much of his relationship with his children merely because Respondent might unilaterally exercise her right to move out of state. A much less restrictive limitation might have addressed how transportation expenses would be shared in the event Respondent moved out of state, so that Petitioner might be afforded nearly all of his ordered access to the children when they resided within New Hampshire. Instead, the divorce decree merely reduced the days of access to Petitioner's children by 73 %.

It is plain that this reduction was arbitrary and capricious, and unfair, and accordingly offensive to both the Equal



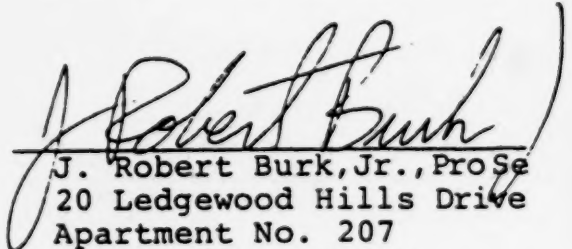
Protection and Due Process Clauses of the Fourteenth Amendment, and this constitutes a special and important reason for this Court to allow the writ in this matter.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari to the Supreme Court of New Hampshire should be granted.

Respectfully submitted,

May 25, 1990

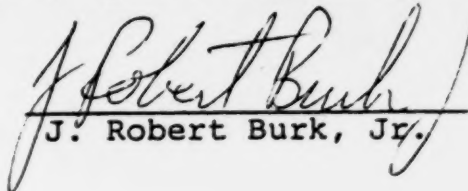

J. Robert Burk, Jr., Pro Se
20 Ledgewood Hills Drive
Apartment No. 207
Nashua, N.H. 03062
(603) 881-9617

AFFIDAVIT OF FILING AND SERVICE

I hereby declare under penalty of perjury that I have filed the requisite number of copies of this Petition with the Court by mailing the same, first class, postage prepaid, certified mail, return receipt requested, from New Hampshire on May 26, 1990.

At the same time, I mailed the requisite number of copies hereof to opposing counsel, Luci S. Pilsbury, Esq., 60 Main Street, Nashua, N.H. 03060 and Robert G. Daniels, Esq., 19 Derry Road, Hudson, N.H. 03051, by the same method.

May 25, 1990


J. Robert Burk, Jr.



STATE OF NEW HAMPSHIRE

Hillsborough, SS.

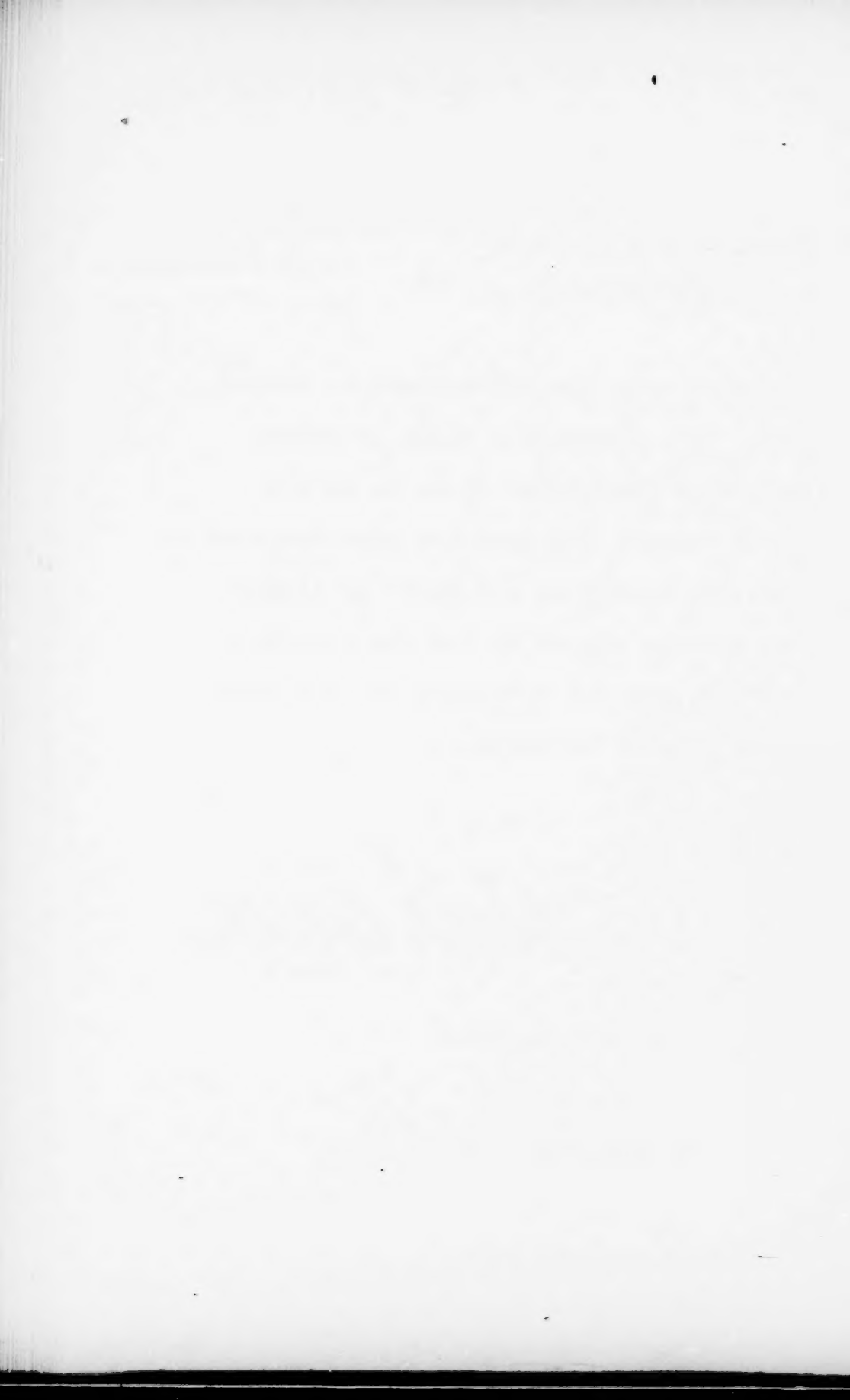
Then came the above-named J. Robert Burk, Jr., personally known or satisfactorily identified to me to be the above-signed, and upon his oath declared that the foregoing affidavit of filing and service signed by him was true and correct, and his voluntary act and deed, under penalty of perjury.

May 25, 1990

Eleanor Benson
NOTARY PUBLIC / JUSTICE OF THE
PEACE

My commission expires:

Eleanor Benson
Notary Public
My Commission Expires Aug. 14, 1994



ADDENDUM

Appendix I

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 89-482 J. Robert Burk, Jr. v.
Patricia A. Burk the court upon January 9,
1990 made the following order:

Plaintiff's motion for leave to file late
notice of appeal is granted. Decision below
is summarily affirmed in accordance with
Rule 25(1)(a).

Distribution:

Hillsborough County Superior Court

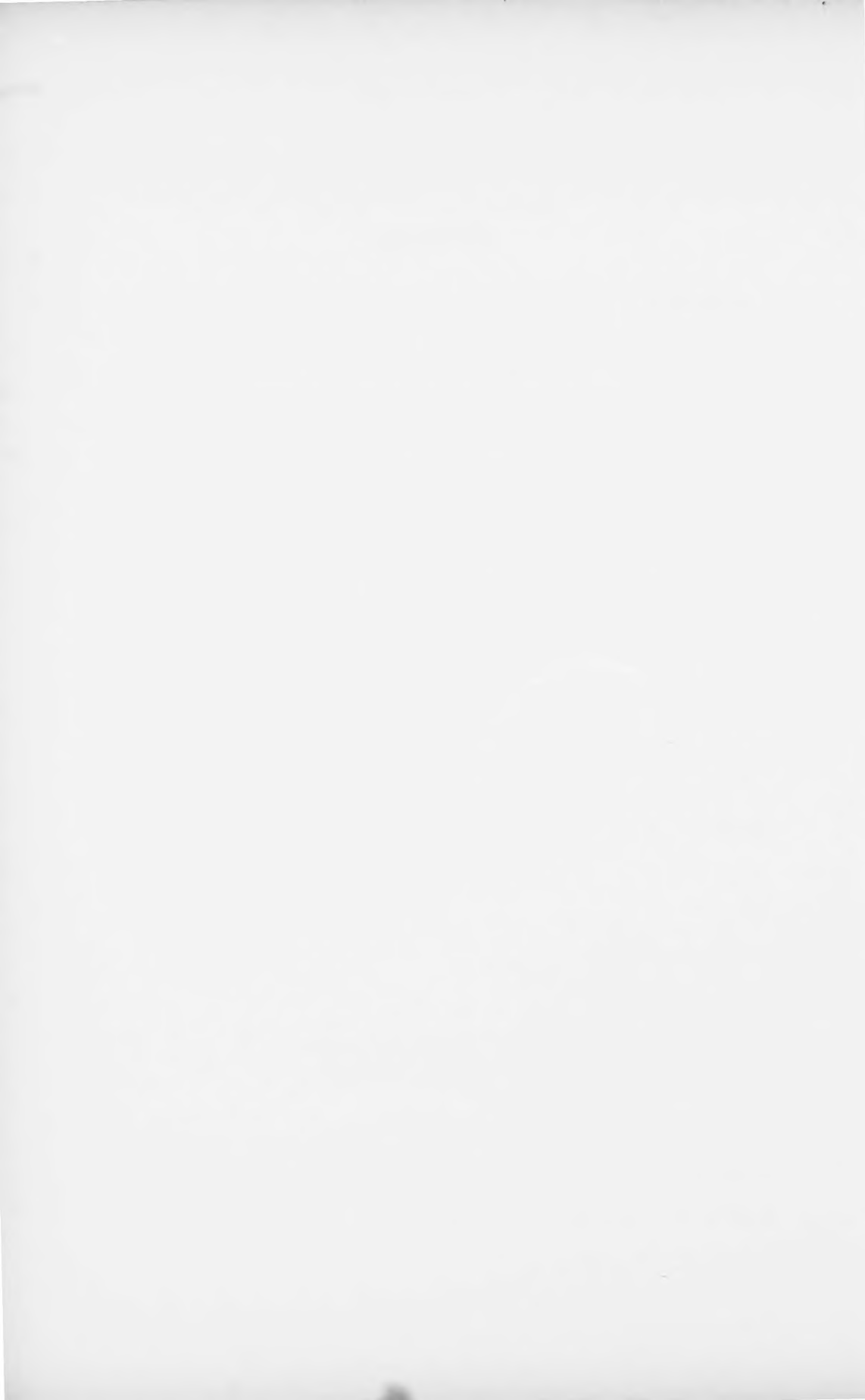
Mr. J. Robert Burk, Jr.

Luci Pillsbury, Esquire

Robert G. Daniels, Esquire

Donna R. Craig, Supreme Court

File



Appendix II

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 89-482 J. Robert Burk, Jr. v.
Patricia A. Burk the court upon February 27,
1990 made the following order:

Plaintiff's motion for reconsideration is
denied. Defendant's motion for expedited
reconsideration is, therefore, moot.

Distribution:

Hillsborough County Superior Court
Mr. J. Robert Burk, Jr.
Luci Pillsbury, Esquire
Robert G. Daniels, Esquire
Donna R. Craig, Supreme Court
File